Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

ROBERT BYLIN AND SANDIE BYLIN,
HUSBAND AND WIFE,
Petitioners,

v.

JOHN R. BILLINGS; OWEN TUCKER;
OPEN CREEK OUTFITTING, LLC;
OPEN CREEK OUTFITTERS, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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November 6, 2009

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QUESTIONS PRESENTED

1. Whether a party is denied due process of law by a federal district court's order allowing the untimely filing of a statute of limitations defense without the district court giving notice and an opportunity to be heard to the party in direct contravention of local rules of procedure and the district court's oral representations to party's counsel.

2. Whether a party is denied due process of law by a federal court of appeals' denial to hear issues raised on appeal pursuant to 28 U.S.C. § 1291 where the party is prohibited from raising these issues because the lower court denied the party an opportunity to be heard.

3. Whether Federal Rule of Civil Procedure 15(a) requires the moving party to prove good cause for its undue delay in filing a motion for leave to amend an answer to add a statute of limitations defense for the first time under the following circumstances: (1) months after the close of discovery, (2) months after deadline for dispositive motions and (3) on the eve of trial.

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Robert and Sandie Bylin, husband and wife, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 568 F.3d 1224 and is reproduced in the Appendix at 1a. The decision of the U.S. District Court for the District of Wyoming is not reported but is reproduced in the Appendix at 23a.

JURISDICTION

The judgment of the court of appeals was issued on June 23, 2009. Pet. App. 1a. Petitioner timely filed a petition for rehearing and rehearing was denied on August 10, 2009. Pet. App. 28a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the

Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c) and (d) and 1295].

Wyo. D. C. L. R. Civ. P. 7.1 Motions

* * *

(b) Filing of Written Briefs.

(1) Non-Dispositive Motion.

* * *

(B) Briefs. A party who files a non-dispositive motion shall include in the motion a short, concise statement of the arguments and authorities in support of the motion. In the alternative, a separate written brief may be filed with the motion, if counsel so desires. Each party opposing the motion shall, within ten (10) days (excluding weekends and holidays) after service of said motion, serve upon all parties a written response containing a short, concise statement of the argument and authorities in opposition to the motion. Failure of a responding party to serve a response within the ten (10) day time limit, or such other time limit as the Court may direct, may be deemed by the Court in its discretion as a confession of the motion.

* * *

Wyo. D. C. L. R. Civ. P. Rule 15.1 Motions to Amend

> (a) Motions to Amend Pleadings. Motions to amend pleadings pursuant to Fed. R. Civ. P. 15(a) shall include a representation that the movant conferred with the opposing party to determine if the opposing party objected to the motion. The motion shall also include a representation whether or not the opposing party has an objection to the motion. If the motion states the opposing party has no objection, the movant shall furnish the Court with a proposed order which the Court will sign. If the motion indicates there is an objection, the Court will consider the objection after response is filed and may decide the matter upon the pleadings or upon hearing.

STATEMENT

This case concerns the due process rights that should be afforded the average litigant who has exercised her rights to pursue state tort law claims. More specifically, whether a district court can unilaterally shorten the time period within which a party can respond effectively negating a party's fundamental due process right to be heard on motions impacting substantial rights. Further, this case concerns the court of appeals' actions in perpetuating the deprivation of due process by failing to consider Petitioner's arguments relying on the general rule of appellate practice that a reviewing court will not consider arguments not raised below. Lastly, there is a split in the circuits as to a court's focus in

considering motions to amend pleadings to assert last minute claims.

In October of 2003, Petitioner Robert Bylin suffered severe and permanent neurological and vascular injuries when his pelvis was fractured in half during a back country hunting trip that was supposed to be supervised and guided by Respondents. Prior to 2003, Respondent Billings owned and operated a hunting camp under the name "Open Creek Outfitting" in a remote section of the northwest corner of Wyoming – just south of Yellowstone National Park. Prior to 2003, Respondent Billings lost his Wyoming outfitter's license for a third time due to various infractions including client safety issues. A license is necessary to operate a hunting camp in Wyoming. Prior to the 2003 hunting season, Respondent Billings along with his friend Respondent Tucker devised a plan to circumvent the Wyoming license requirements by making Respondent Tucker a "partner" in the Respondent limited liability company so that Respondent Tucker could use his newly acquired outfitter's license to continue Respondent Billing's operations. According to Respondent Tucker, he had absolutely no involvement in the operations of the hunting camp, did not guide hunters such as Petitioner and did not supervise hunts or operations.

Respondents Billings, Tucker and Open Creek Outfitting, LLC ("OCO") answered the Complaint on May 23, 2007, setting forth numerous affirmative defenses – but no mention of a statute of limitations defense. On June 27, 2007, an initial pretrial conference was held and there was no mention of a statute of limitations defense and no mention of such was set forth in the district court's "Initial Pretrial

Order." The district court established a deadline for discovery and dispositive motions of November 2, 2007. The magistrate judge who issued the order, however, failed to comply with the local rules and establish a deadline for amendments to pleadings.

On October 16, 2008, after written discovery and numerous depositions, Respondents filed a motion for summary judgment with no mention of any statute of limitations defense. A final pretrial conference was set for January 8, 2008, with a jury trial starting January 28, 2008. Respondents filed their final pretrial memorandum on December 28, 2008 – no mention of a statute of limitations defense. On January 7, 2008, the Court disseminated a "Proposed" Final Pretrial Order, with no mention of any statute of limitations defense. The district court did note that Petitioners requested some amendments to the pleadings with respect to a count of fraud against Respondent Billings and one for piercing the corporate veil.

On the morning of the day prior to the final pretrial – while the parties were taking the deposition of a liability expert in Denver, Colorado – Respondents' counsel informed Petitioners' counsel of their filing of a motion for leave to amend. The next morning at the final pretrial, Respondents raised their motion for leave to amend, and the court stated: *"[i]t just -- it is a waivable defense. It is a defense that must be specifically alleged under Rule 8(c), and it was not, and here we are at the eleventh hour. It is gone."* Pet. App. 32a. The district court went further and stated that: *"I know the standard is prejudice to this side, and it's a tremendous prejudice to this side. ...They've prepared -- I mean, there are volumes of information on this case been prepared, witnesses have been lined up, doctors*

have been arranged, transportation. We're at the trial." Pet. App. 32a.

Petitioner's counsel noted at the final pretrial that he had not had an opportunity to read the Respondents' motion and/or research the issue of amending at such a late date. Counsel made some arguments that he thought may preclude amendment, but specifically requested of the district court as to when Petitioner's needed to file their response. The following exchange between counsel and the court occurred:

> MR. BOSCH: Okay. I'll get it filed as soon as I absolutely can.
>
> THE COURT: Yeah, we're not attempting to change the rules with regard to your opportunity to answer.
>
> MR. BOSCH: Okay.
>
> THE COURT: If you'll get it as soon as possible, it obviously will help us.
>
> MR. BOSCH: I'll do everything I can. I think there's more than just the waiver issue, which I think is definitive, but I just want to make sure those other things are brought out.
>
> THE COURT: Yeah, that's all I came up with. That's just me sitting there. That's my immediate reaction.

Pet. App. 33a.

Wyoming District Court Local Rules of Civil Procedure provide that a party opposing a non-dispositive motion shall "... within ten (10) days (excluding weekends and holidays) after service of said motion, serve upon all parties a written response containing a short, concise statement of the argument and authorities in opposition to the motion." Wyo. D. C. L. R. Civ. P. 7.1(b)(1)(B). The Local Rules also specifically provide that if a party objects to a motion to amend "...the Court will **consider the objection after response is filed and may decide the matter upon the pleadings or upon hearing.**" Wyo. D. C. L. R. Civ. P. 15.1(emphasis in the original).

Six days later[1] on January 16, 2008 at 8:21am, the district court, without allowing the filing of a response by Petitioner and without any argument, granted Respondents' motion for leave to amend their answer and ruled that the answer was "deemed" amended to include a statute of limitations defense. The district court further ordered that Petitioners would have five days to respond to the statute of limitations defense.

At 8 pm on January 16, 2008, Petitioners filed their "Response to Defendant's Affirmative Defenses" and included therein a response to the motion for leave to amend. Petitioners' response included a request for additional time to conduct discovery on the brand new statute of limitations defense. The district court made no inquiry into the cause for the undue delay in filing the motion to amend.

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[1] This excludes the intervening weekend days that are not to be used in calculating response time.

1. **Whether a party is denied due process of law by a federal district court's order allowing the untimely filing of a statute of limitations defense without the district court giving notice and an opportunity to be heard to the party in direct contravention of local rules of procedure and the district court's oral representations to party's counsel.**

Petitioners believe that they had a right to be heard on the motion for leave to amend and that the district court violated their due process rights. As this Court noted, many controversies have "...raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). "At the outset, then, we are faced with what has become a familiar two-part inquiry: we must determine whether [appellant] was deprived of a protected interest, and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (U.S. 1982).

A cause of action is a "species" of property protected by the due process clause. 455 U.S. at 428. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.*; *Societe Internationale v. Rogers*, 357 U.S. 197 (1958)('property' component of the Fifth Amendment's Due Process Clause imposes 'constitutional limitations

upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'); *see also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-351 (1909) (power to enter default judgment); *Hovey v. Elliott*, 167 U.S. 409 (1897) (same).

A party's right to pursue a cause of action does not offer the traditional bundle of rights associated with the ownership of property. *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 989-990 (9th Cir. Cal. 1987).

> Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. Its value is contingent on successful prosecution to judgment. Thus, to the extent it is entitled to due process protection, that protection focuses on assuring access to fair procedures for its prosecution. The notion of due process relevant to causes of action is that 'deprivation . . . by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'

Id. citing Mullane, *supra*.

"A fundamental requirement of due process is 'the opportunity to be heard.' [citation omitted]. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (U.S. 1965)(a court of appeals cannot cure due process violations simply by granting a hearing on appeal, which effectively results

in shifting the burden of proof from one party to the other).

In this matter, a pending motion for leave to amend was being considered by the district court to allow the addition of a statute of limitations defense: (1) long after discovery was closed, (2) well after the deadline for dispositive motions and (3) on the eve of trial. It is not in dispute that the district court ruled without giving Petitioners the right to be heard pursuant to and in the time frame set forth in its local rules. Petitioners even asked whether the district court was shortening the time period within which to answer and the court said "no."

Given that the district court granted leave to amend and immediately *sua sponte* converted the motion for leave to amend into one for summary judgment underscores the substantial rights at issue. Yet, Petitioners were provided no opportunity to respond. The district court ignored its own rules, which Petitioners relied upon to their detriment and harm. This is a violation of Petitioners' due process rights under the Fifth Amendment. It further shifted the burden from Respondent to Petitioner without due process. *See Armstrong*, *supra*.

The court of appeals found that Petitioners' due process argument was undermined by the fact that appeals courts give great deference to local court's interpretations of local rules citing to several cases in a footnote in its opinion. Pet. App. 9a-10a. The court of appeals failed to acknowledge that although a court is given broad discretion in promulgating, administering and interpreting its own rules, the court is also bound by these rules. *United States v. Ferretti*, 635 F.2d 1089,

1093 (3d Cir. Pa. 1980). Once local rules have been promulgated, lawyers and their clients have a right to place reasonable reliance on them. *Id.* To set the strictures of a local rule to one side without advance notice, the court (1) must have a sound reason for doing so, and (2) must ensure that no party's substantial rights are unfairly jeopardized. *United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. P.R. 1989); *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 679 (2d Cir. 1971)(once rules are promulgated they cannot be "blithely" ignored).

The local court rules provided Petitioners with an opportunity to be heard on motions before the court. Petitioners even asked if the district court was changing the rules and the district court replied it was not. Yet, the district court ruled six days later, well before the time period ran to file a response – violating Petitioners' due process rights.

2. **Whether a party is denied due process of law by a federal court of appeals' denial to hear issues raised on appeal pursuant to 28 U.S.C. § 1291 where the party is prohibited from raising these issues because the lower court denied the party an opportunity to be heard.**

The violation of Petitioners' due process rights was further perpetuated by the court of appeals. It is clear that Petitioners had the right to appeal the district court's decision to the court of appeals. *See* 28 U.S.C. § 1291. One of the issues raised by Petitioners on appeal was the application of Federal Rule of Civil Procedure, Rule 16, to Respondents' motion for leave

to amend.[2] The court of appeals, however, refused to address this issue finding that it was not raised below. Because the district court ruled without the benefit of any response from Petitioners, they were effectively prevented from raising any issue. The court of appeals' violation of Petitioners' due process rights caused substantial harm in that Rule 16 would have undoubtedly resulted in the denial of the motion for leave to amend.

The court of appeals recognized that Federal Rule of Civil Procedure, Rule 16, applies to the Respondents' motion for leave to amend as it was effectively attempting to modify the district court's pretrial order to allow the untimely filing of a dispositive motion. *See SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518-19 (10th Cir. 1990)(addressing application of Rule 16 to party adding counterclaims after deadline in pretrial scheduling order); *see also Minter v. Prime Equipment Co.*, 451 F.3d 1196, n.4 (10th Cir. 2006). A pretrial scheduling order may be modified "if it cannot reasonably be met despite the diligence of the party seeking the extension." *See* Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment). "Because diligence is the focus of the inquiry, prejudice to the party opposing the modification is not a prerequisite;..." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609-610 (9th Cir. Cal. 1992). Respondents' motion for leave to amend

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[2] Fed. R. Civ. P. 16(d) provides that a scheduling order may be amended for "good cause." F.R.C.P. 16(d).

fails as no evidence of good cause exists or was offered.[3]

The court of appeals refused to consider this argument as it was not raised below citing to *Stewart v. U.S. Dept. of Interior*, 554 F.3d 1236, 1245 n.1 (10th Cir. 2009). Although the *Stewart* decision provides little guidance, the court of appeals provided some explanation in *Cummings v. Norton*, 393 F.3d 1186 (10th Cir. Utah 2005) stating:

> In order to preserve the integrity of the appellate structure, we should not be considered a 'second-shot' forum, a forum where secondary, back-up theories may be mounted for the first time . . . . Thus, an issue must be presented to, considered [and] decided by the trial court before it can be raised on appeal.

393 F.3d at 1190-1191.

It is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430 (U.S. 1940)(*citing Blair v. Oesterlein Co.*, 275 U.S. 220, 225 (1927); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

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[3] The reason for the delay was the oversight of Respondents' counsel. An attorney's lack of oversight or negligence is not good cause. *Scottsdale Ins. Co. v Okla. Transit Auth., Inc.*, 2007 U.S. Dist. LEXIS 69857 (N.D. Okla. Sept. 20, 2007).

Because the court ruled prior to Petitioners being heard, Petitioners were prevented from raising any issue before the district court. Thus, the court of appeals denial on this basis only perpetuates the due process violation and increases the harm to Petitioners.

3. **Whether Federal Rule of Civil Procedure 15(a) requires the moving party to prove good cause for its undue delay in filing a motion for leave to amend an answer to add a statute of limitations defense for the first time under the following circumstances: (1) months after the close of discovery, (2) months after deadline for dispositive motions and (3) on the eve of trial.**

The district court focused solely on the unfair prejudice to Petitioners in granting leave to amend pursuant to Federal Rule of Civil Procedure, Rule 15. Although the district court recognized the "tremendous" nature of the prejudice to Petitioners, the district court, without giving Petitioners an opportunity to respond, held that the prejudice was not "unfair." The district court completely ignored the reasons, or lack of reasons, for the undue delay in Respondents' filing for leave to amend.

This Court has recognized that in the absence of any apparent or declared reason -such as undue delay, bad faith or dilatory motive on the part of the movant – leave to amend should be granted. *Foman v. Davis*, 371 U.S. 178 (1962). The courts of appeals are not in agreement regarding the showing necessary to establish "undue" delay. The majority of circuits hold

that an amendment may be denied for undue delay only if the trial court finds prejudice, bad faith, futility, or (in some circuits) a substantial burden on the court.[4] The minority rule is that the focus is primarily on the reasons for the delay – i.e. when the

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[4] The majority rule is followed by the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits. See *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993) ("Mere delay, however, absent a showing of bad faith or undue prejudice, does not provide a basis for a district court to deny the right to amend." (internal quotation marks omitted)); *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) ("Delay alone is an insufficient reason to deny leave to amend. Rather, the delay must be accompanied by prejudice, bad faith, or futility.") (internal citation omitted); *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 427 (5th Cir. 2004) ("[D]elay alone is an insufficient basis for denial of leave to amend: The delay must be undue, i.e., it must prejudice the nonmoving party or impose unwarranted burdens on the court."); *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 458-59 (6th Cir. 2001) ("Delay by itself is not sufficient reason to deny a motion to amend. Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted."); *Doherty v. Davy Songer, Inc.*, 195 F.3d 919, 922 (7th Cir. 1999) ("[M]ere delay, without a showing of prejudice, is not sufficient to deny the amendment."); *Doe v. Cassel*, 403 F.3d 986, 991 (8th Cir. 2005) ("Delay alone is not enough to deny a motion to amend; prejudice to the nonmovant must also be shown." (internal quotation marks omitted)); *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) ("Undue delay by itself . . . is insufficient to justify denying a motion to amend . . . [absent] a contemporaneous specific finding of prejudice to the opposing party, bad faith by the moving party, or futility of amendment."); *Atchinson v. Dist. of Columbia*, 315 U.S. App. D.C. 318, 73 F.3d 418, 426 (D.C. Cir. 1996) ("Consideration of whether delay is undue, however, should generally take into account the actions of other parties and the possibility of any resulting prejudice.")

party filing the motion has no adequate explanation for the delay the motion should be denied.[5]

At some point if a party lets her claims lie "fallow", the burden shifts to her to show good cause for the delay. *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15 (1st Cir 1979). There is no prescribed period of time when leave to amend becomes unduly delayed, but undue delay is directly related to the moving party's knowledge and stage of the proceedings. *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998). Thus, where the plaintiff was aware of all the information on which his proposed amended complaint was based prior to filing the original complaint and waited late in the game, the motion is denied without good cause. *Id.*

Justice requires that party not sit on her rights. Here, the Respondents knew of all the facts that formed the basis for their motion for leave to amend to

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[5] This approach is followed by the First, Third, Tenth, and Eleventh Circuits. See *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979) ("[W]here, as here, a considerable period of time has passed between the filing of the complaint and the motion to amend, courts have placed the burden upon the movant to show some valid reason for his neglect and delay." (internal quotation marks omitted)); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir. 2006) ("When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied."); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1206-1207 (10th Cir. Okla. 2006); *Andrx Pharms., Inc. v. Elan Corp.*, 421 F.3d 1227, 1237 (11th Cir. 2005) ("We agree with the district court that [Plaintiff's] explanations for its delay in filing for leave to amend do not demonstrate that justice required the grant of the motion to amend.").

add the statute of limitations[6], yet waited until after discovery was closed, after the deadline for dispositive motions, and on the eve of trial, before raising the motion. At that point, Petitioners had no way to respond to the statute of limitations defense and requested of the court time to conduct additional discovery. The district court, however, did not inquire into the reasons, or lack of reasons, for the undue delay, but only made a determination that the "tremendous" prejudice was not unfair. At this stage in the proceedings, fundamental fairness and due process should require that the burden be on the moving party to provide good cause for the delay. This is the approach taken by the First, Third, Tenth, and Eleventh Circuits, and should be adopted by this Court.

REASONS FOR GRANTING THE WRIT

1. The importance of due process and fundamental fairness in the administration of justice warrants this Court's guidance for district courts and court of appeals on the due process implications of blithely ignoring rules of procedure.

Petitioners could not find any decision from this Court or any lower court that clearly explains what

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[6] Petitioners do not concede that the facts known were sufficient to allow a ruling by the district court. To the contrary, Petitioners argued before the district court and court of appeals that the factual nature of the statute of limitations defense warranted Petitioner be given notice and opportunity to conduct some discovery on the issue.

due process rights a party enjoys in pursuing a state law tort claim in federal court. Dicta from other opinions suggests that a citizen of the United States enjoys the right to pursue his claims or present her defenses. This right is protected by the due process clause, but to what extent, under what circumstances. It appears that such will be decided on a case-by-case basis given the generally factual nature of due process inquiries, but some guidance from this Court is important - not to these parties - but to the public in pursuing fair administration of disputes in our judicial system.

2. This Court should resolve the disagreement amongst the circuits as to whether or not undue delay alone is sufficient to warrant the denial of leave to amend without some showing of good cause for the undue delay.

Federal Rule of Civil Procedure 15 provides guidance to courts on when amendments to pleadings should be allowed and disallowed. Through years of decisions, the circuits have developed two distinct and very different approaches to determining whether leave to amend should be granted. The first approach is that undue delay is not enough to warrant denial without an additional showing of the movant's bad faith or unfair prejudice to the non-moving party. *See e.g. Block v. First Blood Assocs.*, 988 F.2d 344 (2d Cir. 1993). This places the burden on the non-moving party to establish "bad faith" or unfair prejudice no matter when leave to amend is filed – even if the motion is filed after the deadline established by the court for amendments. *See e.g. Minter*, *supra*. The second approach shifts the burden to the moving party to

show good cause as to why they unduly delayed in filing for leave to amend. This approach is consistent with the overall purpose of the rules of civil procedure – i.e. that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. F.R.C.P. 1. To allow leave to amend at any stage of the proceedings – mainly on the eve of trial – without good cause, does not meet this purpose and only frustrates the pursuit of justice. Guidance from this Court to the circuits is warranted.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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November 6, 2009

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 08-8026

[Filed June 23, 2009]

ROBERT BYLIN and SANDIE BYLIN, husband and wife,	)
Plaintiffs - Appellants,	)
v.	)
JOHN R. BILLINGS; OWEN TUCKER; OPEN CREEK OUTFITTING, LLC; OPEN CREEK OUTFITTERS, LLC,	)
Defendants - Appellees.	)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING
(D. Ct. No. 2:07-CV-00083-ABJ)

Gerard R. Bosch, Law Offices of Jerry Bosch, Wilson, Wyoming, appearing for the Appellants.

Amanda K. Roberts (Michael C. Steel, with her on the brief), Lonabaugh and Riggs, LLP, Sheridan, Wyoming, appearing for the Appellees.

Before **TACHA**, **EBEL**, and **HARTZ**, Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs-Appellants Robert and Sandie Bylin (the "Bylins") appeal the district court's dismissal of their suit for negligence and related claims. The district court concluded their claims were time-barred under the two-year statute of limitations set forth in Wyo. Stat. Ann. § 1-3-107(a). We have jurisdiction under 28 U.S.C. § 1291 and AFFIRM.

I. BACKGROUND

Mr. Bylin was seriously injured in October 2003 when he was bucked from a horse during a back-country hunting expedition. Mr. Bylin hired Open Creek Outfitting, LLC ("Open Creek") to guide him on the expedition. Two of Open Creek's professional guides selected his horse and were accompanying him at the time of his injury. At all times relevant to this appeal, the members of Open Creek were Owen Tucker and John Billings.

In April 2007—approximately three and a half years after Mr. Bylin's injury—the Bylins filed suit

against Mr. Billings, Mr. Tucker, and Open Creek[1] (the "defendants") for negligence and related claims,[2] and the defendants filed a timely answer. A magistrate judge then issued a pretrial order setting November 2, 2007 as the deadline for discovery and dispositive motions, and January 28, 2008 as the trial date. In October 2007, the defendants moved for summary judgment, and the Bylins filed their response.

Approximately two months later, with the defendants' summary judgment motion still pending, the Bylins sought leave to amend their complaint to include a count for fraud against Mr. Billings. While preparing their response, the defendants discovered a 2006 Wyoming Supreme Court decision, *Prokop v. Hockhalter*, 137 P.3d 131 (Wyo. 2006), holding that the two-year Wyoming Professional Malpractice Statute of Limitations, Wyo. Stat. Ann. § 1-3-107(a),[3] applies to

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[1] The fourth defendant named in this appeal, Open Creek Outfitters, LLC ("OCO"), never filed an answer or otherwise appeared in this matter. Several weeks before trial, the Bylins' counsel was considering whether to dismiss OCO as a defendant because he had not yet determined whether OCO was a successor in interest to Open Creek or had merely purchased all of Open Creek's assets. For purposes of this appeal we need not decide—and therefore do not decide—whether OCO was appropriately named as a defendant to this action.

[2] This diversity suit was filed in Wyoming federal district court pursuant to 28 U.S.C. § 1332. Accordingly, the district court applied the substantive law of Wyoming. *See Pound v. Ins. Co. of N. Am.*, 439 F.2d 1059, 1062 (10th Cir. 1971) (stating that in diversity cases, "federal courts . . . apply the law of the forum state").

[3] The relevant portion of the statute states:

actions against state-licensed outfitters and professional guides. *Prokop*, 137 P.3d at 136. On January 7, 2008, the defendants moved to amend their answer to include the affirmative defense that all of the Bylins' claims were barred by the statute of limitations. *See* Fed. R. Civ. P. 15(a).[4] The defendants attached to their motion copies of outfitter and professional licenses issued in 2003 to Mr. Tucker and the two guides who accompanied Mr. Bylin.

> (a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
>
> (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
>
> (A) Not reasonably discoverable within a two (2) year period; or
>
> (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

Wyo. Stat. Ann. § 1-3-107(a). It is undisputed that the limitations period, if applicable to the Bylins' claims against the defendants, would have expired in October 2005.

[4] The Bylins claim that Mr. Billings was not among the defendants listed in the motion. The motion expressly names Mr. Billings as one of the defendants, however, as do the defendants' motion for summary judgment and their supplement to the record supporting their summary judgment motion.

The next day, the district court held a final pretrial conference to discuss the Bylins' fraud allegation and the statute-of-limitations defense. The court observed that "all of this is happening at the eleventh hour, the fifty-ninth minute, the fifty-ninth second." The court stated that a statute-of-limitations defense "is a waivable defense," and that it was "gone." The court also noted that the Bylins' fraud argument was "one that should be pled early on in a case and is not one that should be coming before the Court in the eleventh hour." Nevertheless, the court allowed the Bylins to support their motion to amend with deposition testimony they had taken after the November 2 discovery deadline. It also agreed to review both the fraud claim and the defendants' authorities supporting their statute-of-limitations defense. The Bylins' counsel asked the court for at least a couple of days to respond to the defendants' motion to amend their answer, promising "to get it filed as soon as I absolutely can." The court responded that "we're not attempting to change the rules with regard to your opportunity to answer. . . . If you'll get it as soon as possible, it obviously will help us."

One week later, on January 15, the defendants supplemented the record, in support of their summary judgment motion, with affidavit and deposition testimony confirming that Mr. Tucker was the licensed outfitter of record for Open Creek, and that the two guides who had accompanied Mr. Bylin were licensed professional guides. In supplementing the record, the defendants stated:

> This evidence is being submitted so that, in the event the court grants Defendants' motion for leave to amend, the record will include

> sufficient admissible evidence for the Court to grant Defendants judgment as a matter of law on the basis that Plaintiffs' claims, and all of them, are barred by the applicable statute of limitations under the *Prokop* decision.

The next day, the court granted the defendants' motion to amend their answer. The court's order gave the Bylins an additional five days to respond to the defendants' affirmative defense, and the Bylins filed a response that same day.[5] On February 8, the court ordered briefing from both parties on whether the statute of limitations applied to Mr. Billings. Both parties filed their briefs, and on February 28, the district court dismissed all of the Bylins' claims.[6]

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[5] The Bylins' response addressed both the motion for leave to amend—on which the court had already ruled—and the defendants' affirmative defense based on the statute of limitations.

[6] The Bylins claim that the defendants never moved to amend their motion for summary judgment, and that the district court's dismissal of the Bylins' claims was, on that basis alone, an abuse of discretion. We disagree. The defendants' request to "supplement the record in support of [their] motion for summary judgment," which they filed on January 15, 2008, was in effect a motion to amend their summary judgment motion. The Bylins also argue that the court abused its discretion by *raising* the Wyoming statute of limitations sua sponte. *See United States v. Mitchell*, 518 F.3d 740, 748 (10th Cir. 2008) ("In general, a statute of limitations may not be raised *sua sponte* and all circuits to consider this issue have held so explicitly."). Although the court used the phrase "sua sponte" in its order, the court did not actually raise the statute of limitations sua sponte. A court raises an issue sua sponte when it does so "[w]ithout prompting or suggestion; on its own motion." *Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003) (quoting Black's Law Dictionary

On appeal, the Bylins argue that the district court abused its discretion in its application of the Federal Rules of Civil Procedure. Specifically, they argue that the district court erred by failing to scrutinize the reason for the defendants' delay more closely under Rule 15, and by failing to apply Rule 16's "good faith" standard to the defendants' motion. The Bylins also assert that the district court erred in ruling that the statute of limitations applied to each defendant.

II. DISCUSSION

A. Rule 15

We begin by assessing the district court's application of Rule 15, which governs amendments to pleadings generally. Except when an amendment is pleaded as a "matter of course," as defined by the rule, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The rule instructs courts to "freely give leave when justice so requires." *Id.* "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to

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1437 (7th ed. 1999)). The defendants—not the court—raised the statute of limitations defense in their motion to amend their answer. Moreover, the court dismissed the Bylins' claims based on: (1) the defendants' motion for summary judgment, wherein they asserted they were entitled to judgment as a matter of law; and (2) their January 15, 2008 supplement to the record supporting their motion for summary judgment. Although the court certainly could have been more explicit about the basis for its dismissal, the mere statement that it was doing so "sua sponte" was not, by itself, an abuse of discretion or legal error.

cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993).

We review a district court's decision to grant leave to amend for abuse of discretion. *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 559 (10th Cir. 2001). "A district court abuses its discretion if its decision is arbitrary, capricious, whimsical, or manifestly unreasonable." *Orr v. City of Albuquerque*, 417 F.3d 1144, 1153 (10th Cir. 2005) (quotations omitted).

The Bylins rely on *Frank* for the proposition that the district court's denial of leave to amend is appropriate "when the party filing the motion has no adequate explanation for the delay." *Frank*, 3 F.3d 1365–66. The question before us, however, is not whether a district court's *denying* leave to amend was appropriate, but whether its *granting* leave to amend was sufficiently "arbitrary, capricious, whimsical, or manifestly unreasonable" as to constitute an abuse of discretion. *See Orr*, 417 F.3d at 1153 (quotations omitted). The district court has "wide discretion to recognize a motion for leave to amend in the interest of a just, fair or early resolution of litigation." *Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999) (quotations omitted). "Rule 15 . . . was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *United States v. Hougham*, 364 U.S. 310, 316 (1960). Typically, courts will find prejudice only when an amendment unfairly affects non-movants "'in terms of preparing their [response] to the amendment.'" *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1208 (10th Cir. 2006) (quoting *Patton v. Guyer*, 443 F.2d 79, 86 (10th Cir. 1971)).

We conclude that the defendants' late amendment did not unduly prejudice the Bylins, and therefore the district court did not abuse its discretion in allowing the amendment. At the final pretrial conference, the Bylins' counsel asked the court for "at least a couple days" to respond to the defendants' motion. The court agreed and did not rule on the motion until eight days later. The court granted the defendants' motion and gave the Bylins an additional five days to respond to the defendants' statute-of-limitations defense. The Bylins filed their response later that day, addressing both the amendment issue and the statute-of-limitations issue. The court also allowed the Bylins to supplement their fraud claim with depositions they had taken after the November 2 discovery deadline—without requiring them to show good cause for modifying the court's scheduling order—and gave them ten additional days to submit a brief concerning the application of the statute of limitations defense to Mr. Billings.[7]

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[7] On appeal, the Bylins argue that the district court violated at least two of its own local rules of procedure by: (1) giving them fewer than ten days to respond to the defendants' motion to amend before granting the motion; and (2) ruling on the defendants' motion before receiving their response. *See* D. Wyo. R. Civ. P. 7.1(b)(2)(A), *id.* R. 15.1(a). Although a district court's local rules of practice are technically binding on both the court and the parties, "[c]onsiderable deference is accorded to the [court's] interpretation and application of [its] own rules of practice and procedure." *Smith v. Ford Motor Co.*, 626 F.2d 784, 796 (10th Cir. 1980). Other circuits also have recognized the wide latitude district courts enjoy in interpreting and administering their own rules. *See, e.g.*, *Clark v. Hous. Auth. of Alma*, 971 F.2d 723, 727 (11th Cir. 1992) ("[T]his circuit gives great deference to a district court's interpretation of its local rules."); *United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. 1989) ("[A] district court

These pretrial proceedings distinguish this case from *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997), on which the Bylins rely in asserting that the defendants waived the statute-of-limitations defense. In *Venters*, the defendants raised a statute-of-limitations defense for the first time on the eve of oral argument on the plaintiff's motion for summary judgment. *Id.* at 968. The Seventh Circuit held that the statute-of-limitations defense had been waived, primarily because: (1) the plaintiff did not receive notice of the defense until the morning of oral argument; (2) the defense raised a number of new issues; and (3) the district court relied on the defense in granting summary judgment to the defendants, without considering the evident prejudice it caused to the plaintiff. *Id.* at 968–69.

Here, the Bylins received adequate notice of the statute-of-limitations defense and had ample opportunity to respond. Although the district court initially stated that granting the defendants' motion to amend would constitute "tremendous prejudice," it

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should be accorded considerable latitude in applying local procedural rules of its own making, and in departing from them."); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983) ("District courts have broad discretion in interpreting and applying their local rules.").

We conclude that the district court's application of its local rules was based on its reasonable interest in expediting pretrial proceedings and did not unfairly prejudice the Bylins. Thus, the district court did not abuse its discretion. *See United States v. Eleven Vehicles*, 200 F.3d 203, 215 (3d Cir. 2000) ("[A] district court can depart from the strictures of its own local procedural rules where (1) it has a sound rationale for doing so, and (2) so doing does not unfairly prejudice a party who has relied on the local rule to his detriment.").

drew this conclusion before considering the defendants' submission of authorities and testimony in support of their motion, and before it had reviewed the Bylins' supplemental depositions. The court's review of these authorities and evidentiary materials informed the court's conclusion that the defense did not raise new issues requiring substantial discovery. The court therefore appropriately assessed any prejudicial effect its decision would have on the Bylins' claims before dismissing them.

We recognize that the Bylins and their attorneys spent significant time and resources in preparing their case. However, the expenditure of time, money, and effort alone is not grounds for a finding of prejudice. *See Block v. First Blood Assocs.*, 988 F.2d 344, 351 (2d Cir. 1993) (stating that "time, effort and money . . . expended in litigating [a] matter" do not invariably amount to "substantial prejudice"); *Granus v. N. Am. Philips Lighting Corp.*, 821 F.2d 1253, 1256 (6th Cir. 1987) (a plaintiff's showing of prejudice based solely on his expenditure of "much time and money in pretrial discovery . . . [is] no reason for the district court to have denied the [defendant's] amendment" to its answer). For these reasons, we conclude that the district court's granting the defendants leave to amend did not unduly prejudice the Bylins. Thus, the district court did not abuse its discretion in allowing the amendment under Rule 15.

B. Rule 16

The Bylins assert, for the first time on appeal, that the district court erred by failing to analyze the defendants' motion to amend their answer under Rule 16. While Rule 15 governs amendments to pleadings

generally, Rule 16 governs amendments to scheduling orders. Fed. R. Civ. P. 16(b). The Bylins argue that, because the defendants moved to amend their answer more than two months after the magistrate judge's deadline for dispositive motions,[8] their motion effectively amended a scheduling order.[9] Rule 16 only allows such amendments for "good cause," Fed. R. Civ. P. 16(b)(4), an arguably more stringent standard than the standards for amending a pleading under Rule 15. However, because the Bylins did not make the Rule 16 argument to the district court, we do not consider it.

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[8] The magistrate judge's pretrial order failed to set a deadline for amendments to pleadings, as required under Rule 16(b)(3)(A) of the Federal Rules of Civil Procedure. The scheduling order did, however, set a November 2, 2007 deadline for dispositive motions. The defendants' motion to amend is therefore properly viewed as a motion to modify the court's scheduling order with respect to that deadline, given that the motion's intended effect was to bar all of the Bylins' claims.

[9] Most circuits have held that when a party amends a pleading after a deadline set by a scheduling order, Rule 16 and its "good cause" standard are implicated. *See, e.g.*, *Romero v. Drummond Co.*, 552 F.3d 1303, 1318–19 (11th Cir. 2008); *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008); *Nourison Rug Corp. v. Parvizian*, 535 F.3d 295, 298 (4th Cir. 2008); *Trans-Spec Truck Serv., Inc., v. Caterpillar Inc.*, 524 F.3d 315, 327 (1st Cir. 2008); *Leary v. Daeschner*, 349 F.3d 888, 907 (6th Cir. 2003); *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 684 (3d Cir. 2003); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 341 (2d Cir. 2000); *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437–38 (8th Cir. 1999); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609-10 (9th Cir. 1992). This circuit, however, has not ruled on that question in the context of an amendment to an existing pleading. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205 n.4 (10th Cir. 2006) (noting that we have applied Rule 16 to a counterclaim filed after a deadline but have not decided whether Rule 16 applies to a post-deadline amendment to a pleading).

See Stewart v. U.S. Dept. of Interior, 554 F.3d 1236, 1245 n.1 (10th Cir. 2009) (citing *Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1167 (10th Cir. 2005).

We consider issues not raised or argued in the district court "only in the most unusual circumstances, which may include issues regarding jurisdiction and sovereign immunity, instances where public interest is implicated, or where manifest injustice would result." *Smith v. Rogers Galvanizing Co.*, 128 F.3d 1380, 1386 (10th Cir. 1997) (quotations and alterations omitted). We find no such unusual circumstances or "manifest injustice" in this case. We have noted the "rough similarity" between the "undue delay" standard of Rule 15 and the "good cause" standard of Rule 16. *See Minter*, 451 F.3d at 1205 n.4. In addition, appellate courts that have applied Rule 16 have afforded wide discretion to district courts' applications of that rule. *See, e.g., United States v. Dang*, 488 F.3d 1135, 1143 (9th Cir. 2007) ("[T]he district court is given broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order . . . will not be disturbed unless they evidence a clear abuse of discretion.") (quotations omitted); *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 684 (3d Cir. 2003)("Rule 16 was not intended to function as an inflexible straightjacket on the conduct of litigation.") (quotations omitted). For these reasons, it appears unlikely that applying Rule 16 would lead to a different outcome, much less prevent a "manifest

injustice."[10] Thus, we do not consider the Bylins' Rule 16 argument.

C. Applying the Statute of Limitations after *Prokop*

Finally, the Bylins argue that under *Prokop* the statute of limitations does not apply to the defendants and thus does not bar the Bylins' claims against them. They assert that the district court's determination that the statute does apply constitutes legal error. We "review de novo a district court's ruling regarding the applicability of a statute of limitations." *Plaza Speedway Inc. v. United States*, 311 F.3d 1262, 1266 (10th Cir. 2002) (quotations omitted).

We conclude that the statute of limitations applies to all three defendants. In *Prokop*, the Wyoming Supreme Court held, inter alia, that "the two-year statute of limitations set forth in Wyo. Stat. Ann. § 1-3-107(a) applies to actions against licensed outfitters and professional guides." *Prokop*, 137 P.3d at 136. At the time Mr. Bylin was injured, Mr. Tucker was the licensed outfitter of record for Open Creek, and Open Creek was a licenced outfitter. The statute, therefore, clearly applies to them. Additionally, although Mr. Billings was neither a licensed outfitter nor a professional hunting guide at the time Mr. Bylin was injured, the Bylins brought suit against him in his capacity as member and owner of Open Creek. The plain language of Wyo. Stat. Ann § 1-3-107 states that

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[10] Because we decline to consider the Bylins' Rule 16 argument, we leave for another day the question of whether this circuit should apply Rule 16 when a party seeks to amend a pleading after a court-imposed deadline.

"[a] cause of action arising from an act, error or omission in the rendering of licensed . . . services shall be brought within . . . two (2) years of the date of the alleged act . . . ." *Id.* § 1-3-107(a)(i). *Prokop* states that "we need not look any further than the plain language of § 1-3-107(a) to conclude that the two-year statute of limitations applies to causes of action arising from an act, error or omission in the rendering of licensed outfitter or professional guide services." *Prokop*, 137 P.3d at 134–35. The Bylins' suit against Mr. Billings arose from the same "act, error or omission" that Mr. Bylin asserts caused his injuries. We therefore conclude that, under *Prokop*, the statute of limitations applies to Mr. Billings.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order dismissing all of the Bylins' claims and pending motions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 07 - CV - 83 J

[Filed February 28, 2008]

ROBERT BYLIN and SANDIE BYLIN, husband and wife,	)
Plaintiffs,	)
vs.	)
JOHN R. BILLINGS, OWEN TUCKER, OPEN CREEK OUTFITTING, LLC, and OPEN CREEK OUTFITTERS, LLC,	)
Defendants.	)

ORDER DISMISSING ALL CLAIMS

This matter currently sits with 102 docket entries totaling approximately 1,745 pages. The Court having read those pages, considering them, and being fully advised in the premises FINDS and ORDERS as follows:

INTRODUCTION

Robert Bylin fell off a horse in Fall 2003, allegedly as a result of the negligence of hunting guides acting in the course and scope of their employment. Mr. Bylin filed this suit in 2007 against the holder of the guides' outfitting license, the members of that LLC, and another LLC. Mr. Bylin's 2003 horse accident starting the clock on the applicable statute of limitations and any claim was required to be instituted within 2 years of his injury. His claims are time-barred; he filed too late. It is patently obvious that Mr. Bylin cannot prevail on the facts alleged and further discovery would only serve to further impede a just determination of these claims. Therefore this Court, *sua sponte,* dismisses these claims with prejudice. All other pending issues are rendered moot and also are dismissed.

FACTS

According to plaintiffs' complaint, on October 10, 2003, Robert Bylin was participating in a guided elk hunt near Cody, Wyoming. Mr. Bylin booked and bought the trip from Open Creek Outfitting, LLC, which had as its members John R. Billing and Owen Tucker. Mr. Billings was also formerly a member of Open Creek Outfitters, LLC. Owen Tucker was the outfitter of record for Open Creek Outfitting, LLC. Jake Hohn and Kyle Gannon were licensed hunting guides employed by Open Creek Outfitting, LLC who led Mr. Bylin's trip. Mr. Gannon and Mr. Hohn were licensed as professional guides under Mr. Tucker's outfitter's license. The guides, acting in the course and scope of their duties, selected a horse named Drover for Mr. Bylin to ride. Drover rudely, abruptly, and

disastrously dismounted Mr. Bylin soon after being mounted. The sudden dismount resulted in Mr. Bylin allegedly sustaining immediate serious and lasting injuries. Mr. Bylin filed a lawsuit in this Court on April 20, 2007.

SUA SPONTE DISMISSAL

In the course of this litigation, the Court granted a motion by defendants for leave to amend their answer in order to assert an affirmative statute of limitations defense. The Court granted the motion and deemed the answer amended to include the defense. In that same Order, the Court "ORDERED that Plaintiffs shall have five (5) days to respond to Defendants' affirmative defense of application of Wyo. Stat. Ann. § 1-3-107(a), as interpreted by the Wyoming Supreme Court in *Prokop v. Hockhalter,* 2006 WY 75, ¶ 9, 137 P.3d 131 (2006)." (Ord. Granting Ds.' Mot.)

In a filing entered the same day as the Order, plaintiffs stated as follows:

> *Plaintiffs' Response to Affirmative Defense*
> *What Plaintiff can Assert in Response*
>
> 61. Gannon did not have first aid.
>
> 62. Billings was clearly not a licensed professional guide or outfitter[.]
>
> 63. Tucker was not involved in any meaningful way with the Defendant Open Creek.

64. Billings and Tucker engineered the Defendant Open Creek to simply satisfy the requirements of the Wyoming Board of Outfitters.

65. Defendants have not submitted evidence that anyone actually was licensed.

66. The Complaints in this matter are not pertaining to Defendants' failures to help Plaintiff obtain and [sic] elk.

67. Other than Billings, Defendants nor the guides had any contact with Billings [sic] prior to the actual hunt.

68. Defendants have not moved to join Gannon or Hohn as indispensable parties.

(Pls.' Resp. to Ds.' Mot. p. 10)

The Court, in dismissing these claims *sua sponte,* accepts almost all of these claims as true. In regard to ¶ 65 above, defendants submitted copies of licenses for Mr. Gannon, Mr. Hohn, and Mr. Tucker. The Court recognizes "the preferred practice is to accord a plaintiff notice and an opportunity to amend his complaint before acting upon a motion to dismiss for failure to state a claim." *McKinney* v. *State of Okl.*, 925 F.2d 363, 365 (10th Cir. 1991). That Court continued however, stating " we agree with and . . . hold that a *sua sponte* dismissal under Rule 12(b)(6) is not reversible error when it is 'patently obvious' that the plaintiff could not prevail on the facts alleged, . . ., and allowing him the opportunity to amend his complaint would be futile." *Id.* (internal citations omitted). It is

patently obvious that the plaintiffs at bar could not prevail on the facts alleged, even assuming the above are true, and it would be futile to allow any opportunity to amend. The Court's analysis of the statute of limitations issue is as follows and assumes the preceding allegations as true.

PROKOP v. HOCKHALTER

In 2006, the Wyoming Supreme Court answered two certified questions from the United States Court of Appeals for the Tenth Circuit concerning the applicable statute of limitations for licensed outfitters and professional guides. *Prokop,* 137 P.3d at 131. One of the questions stated:

> 1. Wyo. Stat. Ann. § 23-2-407 provides for licensing outfitters and professional guides. Wyo. Stat. Ann. § 1-3-107(a) requires that actions "arising from an act, error or omission in the rendering of licensed or certified professional or health care services be brought within ... two (2) years of the date of the alleged act." Does this statute of limitations apply to actions against licensed outfitters and guides?

Id. at ¶ 2. The *Prokop* Court answered that

> we need not look any further than the plain language of § 1-3-107(a) to conclude that the two-year statute of limitations applies to causes of action arising from an act, error or omission in the rendering of licensed outfitter or professional guide services.

Id. at ¶ 11.

The claims of the present suit are a direct result of the alleged negligence of these defendants "in the rendering of licensed outfitter or professional guide services." *Id.* It is notable in *Prokop* that one of the named defendants, Geri Hockhalter, was neither a professional guide nor a licensed outfitter. *Id.* at ¶ 3. That court did not articulate a separate statute of limitations for claims against her. That situation parallels this one in that Mr. Billings is also neither a professional guide nor a licensed outfitter. This Court will follow the *Prokop* precedent and apply the same statute of limitations against Mr. Billings.

STATUTE OF LIMITATIONS

The ruling in *Prokop* mandates that Wyo. Stat. § 1-3-107 applies in this case. That statute states in part that:

> (a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
>
> > (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
> >
> > > (A) Not reasonably discoverable within the two year period; or

> (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

Id.

Pursuant to § 1-3-107, Mr. Bylin was required to file his claims within two years of his discovery of the accident. Further discovery is not necessary in this matter as the facts, as pled and further introduced, show his immediate knowledge of the accident. Mr. Bylin required immediate medical attention and was ultimately helicoptered from the scene. No plausible application of the discovery rule is available. Therefore the time for filing began to run at the time of Mr. Bylin's hasty and unplanned exit from Drover's back. The statute of limitations barred plaintiffs' claims in 2005. This case was filed in 2007.

Therefore, IT IS ORDERED that all claims should be and are DISMISSED. Further, IT IS ORDERED that all pending motions are rendered moot and are DISMISSED.

Dated this 28th day of February, 2008.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 07 - CV - 83 J

[Filed January 16, 2008]

ROBERT BYLIN and SANDIE BYLIN, husband and wife,	)
Plaintiffs,	)
vs.	)
JOHN R. BILLINGS, OWEN TUCKER, OPEN CREEK OUTFITTING, LLC, and OPEN CREEK OUTFITTERS, LLC,	)
Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION FOR LEAVE TO AMEND THEIR ANSWER TO INCLUDE THE AFFIRMATIVE DEFENSE THAT PLAINTIFFS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

THIS MATTER, having come before the Court on Defendants' Motion for Leave to Amend their Answer, having heard the arguments of the parties at hearing

on Tuesday, January 8, 2008, being included in Defendants' Supplement of the Record in Support of Defendants' Motion for Summary Judgment, and the Court being fully advised in the premises FINDS and ORDERS as follows:

PROCEDURAL BACKGROUND

The Complaint in this matter was filed on April 20, 2007. The Defendants filed their Answer with Affirmative Defenses on May 23, 2007. Defendants filed a Motion for Leave to Amend Their Answer on January 7, 2008. Plaintiffs have not filed a response. Plaintiffs and Defendants agreed, after brief oral argument, at the Tuesday, January 8, 2008, final pretrial conference to file a supplemental response on this matter "soon after Friday," January 11, 2008. Defendant also requested the Court an opportunity to reopen the record an allow the parties an opportunity to supplement the motion and response for summary judgment. The Court granted the request. Defendants filed a Supplement of the Record in Support in Support of Defendants' Motion for Summary Judgment on Tuesday, January 15, 2008. Those papers contain the supplemental materials regarding the Motion for Leave to Amend their answer in addition to the supplemental materials relating to the Motion for Summary Judgment. These supplemental materials request that the Court grant judgment as a matter of law on the basis on Defendants' proposed affirmative defense. Plaintiffs have failed to file anything to supplement their Response to the Motion for Summary Judgment. Plaintiffs have not supplemented their response or filed any written response to Defendants' Motion for Leave to Amend.

Trial in this matter is scheduled to commence on January 29, 2008. Several matters are pending in addition to the Motion for Summary Judgment and Motion for Leave to Amend. Foremost among these is Plaintiffs' Appeal of Magistrate's Order Striking Retained Experts and Treating Physician and Statement of Reconsideration which was filed January 11, 2008. Defendant timely responded January 13, 2008. Plaintiff filed a Motion for Expedited Consideration of Plaintiffs' Object [sic] and Appeal of Magistrate's Order Striking Experts or in the Alternative Continuance of Trial.

ANALYSIS

Fed. R. Civ. P. 15(a) allows amendments to a party's pleading "once as a matter of course . . . if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served." *Id.* The rule also allows a party to amend "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *Id.*

Fed. R. Civ. P. 8(c) and (d) requires a party to "set forth affirmatively . . . statute of limitations" or else that party is deemed to have "admitted when not denied in the responsive pleading." *Id.* Failure to plead an affirmative defense in the answer can have as a consequence forced waiver and exclusion from the case. 5 Wright & Miller, Fed. Practice and Procedure § 1278.

The Tenth Circuit has touched this issue in *Ring v. Lexington Apts. & Motor Inns*, 3 Fed. Appx. 847 (10th Cir. 2001). *Ring* stated that

> appellate courts are not inclined to find a technical failure to comply with Rule 8(c) fatal when the district court has chosen to recognize a belatedly asserted affirmative defense, so long as the record confirms that the plaintiff had adequate notice of the defense and was not deprived of the opportunity to respond.

Ring, 3 Fed. Appx. at 851.

The Court looks to a number of factors in granting Defendants' Motion to Amend the Pleadings. The facts of this case lead this Court to find that granting this amendment does not result in unfair prejudice to the plaintiff. The Plaintiff is not prevented from presenting opposition to the affirmative defense. While the Court acknowledges the delay is presenting the affirmative defense does work a prejudice on Plaintiffs and certainly burdens them, the Court finds that granting the motion does not unfairly prejudice them or place an unfair burden upon their shoulders. Defendants exhibited no bad faith related to the delay in filing this motion to amend. As the Court has allowed the parties an opportunity to supplement the motion and response for summary judgment, the Court finds that this issue is raised during summary judgment.

THEREFORE, Defendants' Motion for Leave to Amend Their Answer is GRANTED. Further, IT IS ORDERED that the Answer is be deemed amended to include an affirmative statute of limitations defense.

FURTHER, IT IS ORDERED that Plaintiffs shall have five (5) days to respond to Defendants' affirmative defense of application of WYO. STAT. ANN. § 1-3-107(a), as interpreted by the Wyoming Supreme Court in *Prokop v. Hockhalter*, 2006 WY 75, ¶ 9, 137 P.3d 131 (2006).

Dated this 16th day of January, 2008.

/s/ Alan B. Johnson
ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 08-8026

[Filed August 10, 2009]

ROBERT BYLIN and SANDIE BYLIN, husband and wife,	)
Plaintiffs - Appellants,	)
v.	)
JOHN R. BILLINGS; OWEN TUCKER; OPEN CREEK OUTFITTING, LLC; OPEN CREEK OUTFITTERS, LLC,	)
Defendants - Appellees.	)

ORDER

Before **TACHA**, **EBEL**, and **HARTZ**, Circuit Judges.

Appellants' petition for rehearing is denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. 07-CV-00083-J

[Dated January 8, 2008]

ROBERT BYLIN and SANDIE BYLIN, husband and wife,	)
Plaintiffs,	)
vs.	)
JOHN R. BILLINGS, OWEN TUCKER OPEN CREEK OUTFITTING, LLC, and OPEN CREEK OUTFITTERS, LLC,	)
Defendants.	)

Cheyenne, Wyoming
January 8, 2008
9:05 a.m.

TRANSCRIPT OF FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	MR. GERALD R. BOSCH Attorney at Law LAW OFFICES OF JERRY BOSCH P.O. Box 872 Wilson, WY 83014
For the Defendants:	MR. MICHAEL C. STEEL MS. AMANDA K. RUSTAD Attorneys at Law LONABAUGH & RIGGS, LLP P.O. Drawer 5059 Sheridan, WY 82801-5059
Court Reporter:	JULIE HEDELSON, RMR, CRR Official Court Reporter 2120 Capitol Avenue, Room 2228 Cheyenne, WY 82001 (307) 778-0078

* * *

[p.22] As to licenses and things like that, I don't foresee at least right now objecting to that kind of testimony. It's one or two questions. In fact, our one expert is going to say that just taking a guide's license isn't enough to be experienced to be doing these things and that's part of the problem.

But I just want to make sure that I understand the Court's -- I don't want to say decision because I didn't hear that, but at least the Court's ruling or direction is

that if it's not in the pretrial, we're not dealing with it at trial.

THE COURT: Well, that's correct. And if you want me to telegraph where I'm going with it, it seems to me with regard to the late filing of an issue that raises statute of limitations, that issue was waived because it is an issue that was not raised in the original pleadings nor an amended pleading in this matter, nor was it an issue that was raised in a motion -- in a timely motion to dismiss the complaint under Rule 12(b).

MR. BOSCH: Okay.

THE COURT: It just -- it is a waivable defense. It is a defense that must be specifically alleged under Rule 8(c), and it was not, and here we are at the eleventh hour. It is gone.

MR. BOSCH: Okay.

THE COURT: Similarly, it seems to me that the

* * *

[p.25] on this point. And I think --

THE COURT: I know the standard is prejudice to this side, and it's a tremendous prejudice to this side.

MR. STEEL: The case --

THE COURT: They've prepared -- I mean, there are volumes of information on this case been prepared,

witnesses have been lined up, doctors have been arranged, transportation. We're at the trial.

* * *

[p.79] MR. BOSCH: Okay. I'll get it filed as soon as I absolutely can.

THE COURT: Yeah, we're not attempting to change the rules with regard to your opportunity to answer.

MR. BOSCH: Okay.

THE COURT: If you'll get it as soon as possible, it obviously will help us.

MR. BOSCH: I'll do everything I can. I think there's more than just the waiver issue, which I think is definitive, but I just want to make sure those other things are brought out.

THE COURT: Yeah, that's all I came up with. That's just me sitting there. That's my immediate reaction.

MR. BOSCH: Yeah.

MR. STEEL: Your Honor, would it be helpful to the Court or would the Court like the defendants to brief the issues of the case law on the amendment and, looking ahead, if that amendment were to be allowed to brief the issue on whether or not that statute of limitations bars the claims?

THE COURT: Well, I think Prokop is pretty definitive that it would. You know, it talks about both

contract claims as well as, as well as tort claims, and it's -- the Supreme Court is pretty broad in what it said.

MR. STEEL: I agree.

THE COURT: Do what suits you, but if you don't have [p.80] the time -- that's the other problem. I mean, all we have is a motion and no accompanying, you know, anything really been submitted with it, and here we are at the eleventh hour.

MR. BOSCH: And in lies the prejudice beyond that. I mean, I just don't know when we can get something filed, but we'll do our best, Your Honor.

MR. STEEL: The reason I asked the question, Your Honor, is because as soon as I learned of the Prokop decision, I wanted to get the motion to amend filed, and I did so as quickly as I could so we could talk about it today. And so I just -- if there are substantive questions of law beyond your decision on my motion to amend, then I can brief those and get that to you for the Court to look at fairly quickly.

THE COURT: Well, I think you're in the position at this point, you just have to look at what he submits and maybe have a day to get something in. I don't -- I don't know how else to handle it.

MR. BOSCH: Yeah, I've never -- well, Your Honor, we'll try and get a response in to what motion was filed. I don't know what issues were raised other than just saying the statute of limitations applies.

THE COURT: We give each side a brief opportunity to conduct some voir dire, but you submit voir dire to me so that -- and I kind of go through it. I think Judge Downes, as an old defense attorney, spends a lot more time on voir dire

* * *

No. 09-569

IN THE

Supreme Court of the United States

ROBERT BYLIN, *et ux.*,

Petitioners,

v.

JOHN R. BILLINGS, OWEN TUCKER, and OPEN CREEK OUTFITTING, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners were afforded all the process that is due under the circumstances of this case.

2. Whether the court of appeals properly refused to consider an issue raised for the first time on appeal without denying Petitioners due process of law.

3. Whether the federal district court properly exercised its discretion in granting Respondents' Federal Rule of Civil Procedure 15(a) motion.

CORPORATE DISCLOSURE STATEMENT

Respondent, Open Creek Outfitting, LLC, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION AND SUMMARY OF THE REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari ("Petition") fails to present any matter meriting review by this Court. *See* Sup. Ct. R. 10. Petitioners were provided all the process that was due under the circumstances of this case. Petitioners were provided both notice and an opportunity to be heard prior to the district court's granting of Respondents' motion for leave to amend their answer and any perceived error made by the district court in shortening the time for Petitioners to file a written response after hearing oral arguments was harmless.

Because Petitioners were not deprived of due process in the lower court, it follows that the court of appeals appropriately refused to consider Petitioners' argument that the Rule 15(a) motion should have been considered under the good cause standard of Rule 16, which argument was raised for the first time on appeal. Although the court of appeals ultimately refused to consider the issue, it commented that even if Rule 16 were applied in this instance, it would unlikely lead to a different outcome given the "rough similarity" between the standards of the two rules. (Pet. App. 13a-14a).

The final question presented by Petitioners is also not worthy of this Court's review. This Court set forth certain factors to be considered when a court exercises discretion in contemplating a Fed. R. Civ. P. 15(a) motion. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962).

The district court appropriately determined that there was no bad faith related to the delay in filing the motion for leave to amend and that the delay did not unfairly prejudice the Petitioners. The district court's decision in this regard does not conflict with this Court's ruling in *Foman*, nor any decision by any other court. Although Petitioners contend that a circuit court split exists with respect to one of the factors, undue delay, which may be considered when contemplating a Rule 15(a) motion, this is simply not an issue that requires uniformity among the circuits given the liberality of the rules for amending pleadings and the deference afforded to district courts in determining such motions.

For the foregoing reasons, the Petition should be denied.

STATEMENT OF THE CASE

This lawsuit arose out of a horse accident that occurred on a hunting trip guided by Defendant Open Creek Outfitting, LLC, ("Open Creek") in October of 2003. (Aplt. App. at 13-14). Specifically, Plaintiff Robert Bylin ("Bylin"), a client of Open Creek, was injured when the horse he was riding began to jump and buck unexpectedly. (Aplt. App. at 14).

Earlier in 2003, Bylin purchased an elk hunting trip from Open Creek, a limited liability company organized under the laws of the state of Wyoming. (Aplt. App. at 12-13). The members of Open Creek were Defendants Owen Tucker ("Tucker") and John R. Billings ("Billings"). (Aplee. Supp. App. at 50, 114, 195). Tucker was licensed as an outfitter by the Wyoming Board of

Professional Outfitters and Guides (the "Board"). (Aplee. Supp. App. at 194-196). Billings was not a licensed outfitter or guide. Pursuant to the Board's rules and regulations, Tucker was the "outfitter of record" for Open Creek. (Aplee. Supp. App. at 194-196). The two guides employed by Open Creek led Bylin's hunting trip and matched Bylin with the horse that bucked Bylin off. (Aplee. Supp. App. at 45-47). Both guides were licensed as professional guides under Tucker's outfitter's license and were present at the time of Bylin's injury. (Aplee. Supp. App. at 44-49, 122-123, 187-189, 191-193). Billings was not present when Bylin was injured, nor did Billings match Bylin with the subject horse. (Aplee. Supp. App. at 21, 115).

Petitioners filed their complaint on April 20, 2007 – three and one-half years after the accident. (Aplt. App. at 2, 11-24). Petitioners asserted several causes of action: (1) negligence (breach of reasonable care); (2) negligent hiring and supervision; (3) negligent misrepresentation; (4) negligent infliction of emotional distress; and (5) loss of consortium. (Aplt. App. at 11-24). Respondents Billings, Tucker, and Open Creek, collectively "Respondents", answered the complaint on May 23, 2007. (Aplt. App. at 2). In their answer, Respondents asserted several affirmative defenses. (Aplt. App. at 25-35). Respondents, however, did not assert that Petitioners claims were barred by the two-year professional malpractice statute of limitations. (Aplt. App. at 25-35).

Respondents filed their pretrial memorandum on December 28, 2007, with their previously filed summary judgment motion still pending. (Aplt. App. at 52-64). Petitioners' pretrial memorandum followed on December 31, 2007. (Aplt. App. at 6). In their pretrial memorandum, Petitioners indicated, for the first time, that they desired to amend their complaint to assert a fraud claim against Respondent Billings. (Aplt. App. at 102, 111). In preparing to address this potential new claim at the pretrial conference, Respondents researched the statute of limitations for fraud claims. (Aplt. App. at 111). In doing so, Respondents discovered a recently decided case from the Wyoming Supreme Court, *Prokop v. Hockhalter*, 2006 WY 75, 137 P.3d 131 (Wyo. 2006), holding that the two-year professional malpractice statute of limitations applies to claims against professional outfitters and guides. (Aplt. App. at 111). Respondents immediately filed a motion for leave to amend their answer pursuant to Fed. R. Civ. P. 15(a) to assert the affirmative defense that all of Petitioners' claims are barred by the two-year statute of limitations. (Aplee. Supp. App. at 116-123). Copies of the 2003 licenses issued to Tucker and the two employee-guides were attached to the motion. (Aplee. Supp. App. at 121-123).

The final pretrial conference was held on January 8, 2008, one day after Respondents filed their motion to amend. (Aplt. App. at 106-202). At the conference, Petitioners' counsel informed the court that he was prepared to address Respondents' motion for leave to amend. (Aplt. App. at 111). The court heard argument from both sides and took the matter under advisement, stating it would review the authorities cited by the

parties and make a decision.[1] (Aplt. App. at 111, 129-133, 182-83). At Petitioners' request, the court also reopened the record with respect to Respondents' pending motion for summary judgment. (Aplt. App. at 193-198).

On January 15, 2008, Respondents then supplemented the record in support of their motion with affidavit and deposition testimony confirming that Tucker was the licensed outfitter of record for Open Creek and that the two guides were licensed professional guides at the time of the accident. (Aplee. Supp. App. at 139-199). In supplementing the record, Respondents stated:

> "[t]his evidence is being submitted so that, in the event the Court grants [Respondents'] motion for leave to amend, the record will

1. Petitioners do not include the full discussion concerning the motion for leave to amend and also misrepresent to this Court that the motion had not been read by Petitioners' counsel prior to the final pretrial conference. (Pet at 6). A review of the transcript from the final pretrial conference shows that Petitioners were prepared to argue the issue (and thus had read the motion) and informed the court of the "extreme" prejudice it would suffer if the motion were granted. (Aplt. App. at 111, 129-133). Further, Petitioners' counsel provided case cites for law purporting to support their opposition to the motion. (Aplt. App. at 132-133). Finally, although the district court at one point stated the statute of limitations defense was "gone", it agreed to take the matter under advisement and render a final decision at a later date. (Aplt. App. at 136, 182-183). Petitioners' counsel then asked the court for at least a couple of days to respond and promised "to get it filed as soon as I absolutely can."(Aplt. App. at 183-184).

> include sufficient admissible evidence for the Court to grant [Respondents] judgment as a matter of law on the basis that [Petitioners'] claims, and all of them, are barred by the applicable statute of limitations under the *Prokop* decision."[2]

(Aplee. Supp. App. at 141).

After receiving supplemental materials submitted from both parties and being well aware of the parties' respective positions on the motion due to hearing oral arguments on the matter, the district court granted Respondents' motion for leave to amend and deemed the answer amended to include the limitations defense, correctly finding that Petitioners could not establish legally cognizable prejudice and that Respondents had not acted in bad faith. (Aplt. App. at 204-208). Because the court previously reopened the record, the court also deemed the limitations defense raised for purposes of summary judgment. (Aplt. App. at 204-208). Petitioners were then given an additional five (5) days to respond to the affirmative defense. (Aplt. App. at 204-208). On January 16, 2008, Petitioners filed their supplemental response to Respondents' motion for summary judgment as well as their response to the order granting leave to amend. (Aplt. App. at 8, 209-221).

---

2. Petitioners continue to claim that the district court *sua sponte* converted the motion for leave to amend into one for summary judgment. (Pet. at 10). As the court of appeals correctly points out, though, Respondents' request to supplement the record in support of their motion for summary judgment was in effect a motion to amend their summary judgment motion. (Pet. App. 6a, fn.6).

Thereafter, the court requested supplemental briefing on the application of the statute of limitations to Billings. (Aplt. App. at 222-223). Both parties submitted the additional briefing. (Aplee. Supp. App. at 200-238). The court ultimately concluded that the two-year statute of limitations applied and barred all of Petitioners' claims as to all Respondents. (Aplt. App. at 224-230). This appeal followed. (Aplt. App. at 232). This decision was affirmed by the United States Court of Appeals for the Tenth Circuit. Petitioners' request for rehearing on the matter was denied. The Petition pending before this Court followed.

REASONS FOR DENYING THE PETITION

The decisions below are wholly consistent with the principles of fundamental fairness that govern judicial proceedings and do not conflict with a decision of this Court or any other court presented with these same facts. Therefore, Petitioners have not carried their burden of demonstrating any "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. THE DISTRICT COURT AFFORDED PETITIONERS ALL THE PROCESS THAT WAS DUE UNDER THE CIRCUMSTANCES OF THIS CASE

Petitioners contend that they were denied due process of law because the district court rendered its decision to grant Respondents' motion for leave to amend their answer to assert the statute of limitations defense four days prior to the expiration of the time for Petitioners to file a written response. Petitioners

suggest that this somehow negated their fundamental due process right to be heard on a motion impacting their substantial rights. (Pet. at. 3). Petitioners' denial of due process claim rings hollow, though, when it is remembered that they filed their tort claim approximately one and a half years after the statute of limitations had run.

Despite the fact that Petitioners filed an untimely claim, they now seek redress with this Court based on the district court's alleged procedural error. Although Petitioners assert that the motion for leave to amend impacted their substantial rights, it was simply a motion that ultimately led to placing Petitioners in the same position they were in on the day their untimely claim was filed.[3] Nonetheless, Petitioners were provided all the process that was due under the particular circumstances of this case. Petitioners were provided both notice and an opportunity to be heard prior to the district court's granting of Respondents' motion for leave to amend their answer. Any perceived error made by the district court in shortening the time for Petitioners to file a written response after hearing oral arguments on the issue is harmless and not worthy of this Court's review.

This Court has long held that "[t]he fundamental requirement of due process is the opportunity to be

3. In fact, it is doubtful that a non-dispositive motion, such as the one at issue here, affects a substantial right. *See*, Fed. R. Civ. P. 61 (explaining that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (quotations omitted). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (citations omitted). "Precisely what procedures the Due Process Clause requires in any given case is a function of context." *Brewster v. Board of Educ. of the Lynwood Unified School Dist.*, 149 F.3d 971, 983 (9th Cir. 1998). Here, Petitioners were given all the procedural protections the situation demanded.

As explained above, Petitioners orally responded to Respondents' motion for leave to amend at the final pretrial conference. Petitioners informed the district court that they were prepared to argue the issue and did so by asserting the "extreme" prejudice they would suffer given the effort and money expended in the litigation to date. (Aplt. App. at 111,129-133). Petitioners also provided case law cites to the court for its consideration of the issue. (Aplt. App. at 129-133). Thereafter, and at Petitioners' request, the district court reopened the record to allow both parties to supplement it with respect to Respondents' pending summary judgment motion. (Aplt. App. at 192-198). Petitioners then had several business days in which to file a written response, though the court rendered its decision prior to expiration of the time allowed under the local rules.

Although the time for filing a written response as set forth in the local rules was cut short by the district

court, this error (if at all) was harmless.[4] For example, in the context of summary judgment where the lower court granted the dispositive motion prior the expiration of time for filing a response, courts have held such error is harmless in the absence of prejudice to the non-moving party. *See, e.g., Oppenheimer v. Morton Hotel Corporation*, 324 F.2d 766, 768 (6th Cir. 1963) (holding that it is not reversible error for a district court to grant summary judgment before the expiration of the 10-day response period, if no prejudice can be demonstrated by the unsuccessful party.)

In this case, Petitioners were not up against a dispositive motion, but rather a motion for leave to amend to assert an affirmative defense. Petitioners had

4. A district court's local rules of practice are technically binding on both the court and the parties. However, "[c]onsiderable deference is accorded to the [court's] interpretation and application of [its] own rules of practice and procedure." *Smith v. Ford Motor Co.*, 626 F.2d 784, 796 (10th Cir. 1980). *See also, Clark v. Hous. Auth. of Alma*, 971 F.2d 723, 727 (11th Cir. 1992); *United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. 1989); *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983). As long as the court has a sound rationale and does not unfairly prejudice a party, the court may permissibly "depart form the strictures of its own local procedural rules." *United States v. Eleven Vehicles*, 200 F.3d 203, 215 (3d Cir. 2000). In this case, the court presumably shortened the time frame to respond to the pending motion because trial was rapidly approaching, necessitating expedition of the pretrial proceedings. Petitioners were not unfairly prejudiced by the departure from the local rules because the district court had the benefit of their argument from the final pretrial conference and Petitioners were given several days thereafter within which to file a written response.

already provided opposition to the motion at a hearing before the district court's decision was entered. Thereafter, Petitioners were permitted additional time to oppose the affirmative defense. (Pet. App. 27a). As a result, Petitioners cannot and have not demonstrated any prejudice they suffered because the district court rendered its decision four days before the expiration of time for Petitioners to file a written response. *See, e.g., English v. Cowell*, 10 F.3d 434, 438 (7th Cir. Ill. 1993) (discussing that the "harmless error doctrine saves premature rulings when the district court is found to have entertained the nonmovants' arguments on a prior or subsequent motion.")

The district court had all the information it needed to render the decision it did. Petitioners have not provided the lower court, the court of appeals, or this Court with any information on what more should have been considered by the lower court in determining the motion for leave to amend that would have been outcome determinative.[5] Nor did Petitioners request that the court reconsider its decision upon the filing of Petitioners' written response. This is likely so because the written response failed to present any new argument

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5. Petitioners appear to claim that they were prejudiced by the amendment of the answer because they were prevented from conducting additional discovery on the issue. (Pet. at 7, 16-17). However, Petitioners have never demonstrated what additional facts they hoped to uncover during discovery that would be outcome determinative. The record reflects the outfitters and guides were licensed and, therefore, subject to the two-year statute of limitations in Wyoming. (Aplee. Supp. App. at 187-189, 191-196) No amount of additional discovery could change those facts.

or reason why Respondents' motion should be denied. Accordingly, the failure to allow Petitioners the full ten-day period to file a written response to the motion is harmless.

II. THE COURT OF APPEALS PROPERLY REFUSED TO CONSIDER PETITIONERS' ARGUMENT THAT RESPONDENTS' RULE 15 MOTION SHOULD BE GOVERNED BY THE GOOD CAUSE STANDARD OF RULE 16 BECAUSE IT WAS RAISED FOR THE FIRST TIME ON APPEAL

Petitioners next claim that because the district court shortened the time for them to file a written response to Respondents' motion, they were effectively prevented from making any arguments relative to the motion on appeal. Because Petitioners were not deprived of due process in the lower court, it follows that the court of appeals' refusal to consider a new argument did not deprive Petitioners of due process.

Specifically, Petitioners contend the court of appeals denied them due process because it refused to decide the issue of whether the standards governing Fed. R. Civ. P. 16 apply to Respondents' motion for leave to amend. Of importance, Petitioners did file a written response to the motion, albeit after the district court rendered its decision, and in that response, made no mention of the newly asserted Rule 16 argument. Accordingly, even if the written response had been received by the district court prior to its decision, the Rule 16 argument would not have been before it. Thus, Petitioners were not harmed by the court of appeals'

refusal to consider this argument for the first time on appeal.

Notably, the court of appeals did comment in its decision that application of Rule 16 in this instance would unlikely lead to a different outcome given the "rough similarity" between the "undue delay" standard of Rule 15 and the "good cause" standard of Rule 16 and the wide discretion afforded district courts in applications of that Rule (Pet. App. 13a-14a), thus demonstrating the lack of merit in Petitioners' claim that application of Rule 16 standards would have "undoubtedly resulted in the denial of the motion for leave to amend". (Pet. at 12).

III. THE DISTRICT COURT PROPERLY CONSIDERED THE RELEVANT FACTORS IN CONSIDERING RESPONDENTS' MOTION FOR LEAVE TO AMEND. ITS DECISION DOES NOT CONFLICT WITH ANY RELEVANT DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS. IT IS UNNECESSARY FOR THIS COURT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE SHOWING NECESSARY FOR UNDUE DELAY.

Petitioners final contention is that the district court improperly focused on determining whether Petitioners would be unfairly prejudiced by the granting of leave to amend instead of finding undue delay as a basis to deny leave to amend. Petitioners then describe a split in the circuit courts regarding the showing necessary to deny a motion for leave to amend for undue delay. While it appears there is a majority and minority view in the circuits concerning the showing necessary for undue

delay, this circuit split is of no moment to this case. The issue is not whether the district court properly *denied* the request for leave to amend. Rather, the issue is whether it was proper for leave to be *granted*. Given the wide discretion given to the courts in contemplating motions for leave to amend and the factual nature of the inquiry, this simply is not an issue that requires uniformity among the circuits and certainly does not present an issue requiring resolution by this Court.

Federal Rule of Civil Procedure 15(a) states that such leave "shall be freely given when justice so requires." This Court has articulated that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. at 182.

> "In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be 'freely given'."

Id. "The grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court," and such decision will not be reversed by the appellate court absent an abuse of that discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971); *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197 (10th Cir. 2002). An abuse of discretion does not occur unless the district court's decision "is arbitrary,

capricious, whimsical, or manifestly unreasonable." *Orr v. City of Albuquerque*, 417 F.3d 1144, 1153 (10th Cir. 2005) (citing *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999).

A review of the district court's order shows that it carefully considered the relevant factors when it contemplated the pending motion for leave to amend. In particular, the district court determined that Respondents did not exhibit bad faith related to the delay in filing the motion and that such delay did not unfairly prejudice Petitioners. (Pet. App. 26a). Although Petitioners fault the district court for failing to deny the motion on the basis of undue delay, the district court did not abuse its discretion in granting the motion in the absence of finding undue prejudice to the Petitioners.

In deciding if undue prejudice will result to a plaintiff opposing a defendant's motion to amend his answer to include a limitations defense, the circuit courts generally consider whether allowing the amendment will: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the opponent from bringing a timely action in another jurisdiction. *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). None of these factors weighed in favor of denying Respondents' motion, thus the district court correctly found no undue prejudice.

With respect to the first prejudice factor, it was clear that allowing the limitations defense would not require

Petitioners to expend any additional resources to conduct discovery or prepare for trial because all of the material facts necessary to decide the limitations issue were already established in the record before the court granted Respondents' motion to amend. The district court recognized that deciding the limitations defense would simply involve applying these already-established facts to a mathematic formula, noting correctly that the dates to be inserted in such formula — i.e., the date suit was filed and the date of the accident — could not be changed by any amount of discovery.

With respect to the second prejudice factor, it was clear that allowing the limitations defense would not delay resolution of the dispute. In fact, allowing the limitations defense served judicial economy in that it quickly resolved all outstanding claims.

With respect to the third prejudice factor, it was clear that Petitioners could not have timely brought their claims in another jurisdiction. The only other jurisdiction in which the claims could ever have been filed is state court in Wyoming, and as aptly noted by the district court, Petitioners' claims were already time barred on the date suit was filed.

The fact that allowing the limitations defense will defeat a plaintiff's claim is not the type of "prejudice" that prevents a motion for leave to amend from being granted. In other words, "the mere fact that a claim may be time-barred by allowing an answer to be amended to assert the limitations defense does not constitute prejudice." *Feeney, et al. v. Dunham*, 2007 U.S. Dist. LEXIS 28808 (Dist. Conn. 2007) (*quoting Gleeson v.*

Prevoznik, 2006 U.S. Dist. LEXIS 80187 (M.D. Pa. 2006)). *See also, Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (stating that prejudice cannot be demonstrated based solely on the untimely assertion of the affirmative defense as the defense would have been dispositive had it been asserted when the action was filed); *Long v. Wilson*, 393 F.3d 390, 400 (3d Cir. 2004) ("The frustrated expectation of not having an untimely . . . petition heard on the merits does not establish prejudice sufficient to defeat an amendment to an answer.").

Petitioners' request urging that this Court now require a showing of good cause before leave to amend will be granted is based solely on the wholly illogical premise that, despite Petitioners' original failure to file their suit on time, Petitioners are entitled to, and will somehow suffer injustice if they are not allowed to, take advantage of Respondents' mistake of failing to identify their limitations defense sooner.

Respondents respectfully submit that the liberal amendment rules are not designed to excuse a petitioners' late filing when a respondent, acting in good faith, discovers the limitations defense and immediately files the appropriate motion for leave to amend his answer, and the court, after hearing from both parties, determines that there was no bad faith, that allowing the amendment will not prejudice the petitioners, and then affords the petitioners ample opportunity to respond to the limitations defense.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

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